84-1391

No. .....

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In the Supreme Court of the United States

OCTOBER TERM, 1984

INDEPENDENT SCHOOL DISTRICT NO. 3 OF BROKEN ARROW, TULSA COUNTY, OKLAHOMA,
Petitioner,

vs.

CARLA R. HELMS,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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March, 1985

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QUESTIONS PRESENTED FOR REVIEW

1. Is a mentally handicapped child who has received twelve (12) or more years of appropriate special education in Oklahoma entitled to receive continued special education at public expense until reaching the age of twenty-one (21) under The Education of the Handicapped Act, 20 U.S.C. §§ 1401, *et seq.*?

2. Unlike the situation in *Hendrick Hudson Dist. Bd. of Ed.* v. *Rowley*, 458 U.S. 176, 102 S.Ct. 3034, 73 L.Ed.2d 690 (1982), wherein the handicapped child was "mainstreamed" in the regular classroom, what standard determines the adequacy of "educational benefit" that must be conferred upon a mentally retarded child in order to constitute an "appropriate public education" under the Act?

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OPINIONS BELOW

The following Opinions delivered by the Courts and Administrative Tribunals below are set forth in the Appendix:

1. Due Process Decision, *Helms* v. *Broken Arrow Public Schools,* Hearing No. 242 (1982).

2. The Appeal Review Decision of the Oklahoma State Department of Education, *Helms* v. *Broken Arrow Public Schools,* Case No. 242 (1982).

3. The Order of the United States District Court for the Northern District of Oklahoma, *Helms* v. *Independent School Dist. No. 3,* Case No. 82-C-752-C (1983).

4. The Opinion of the Tenth Circuit Court of Appeals, *Helms* v. *Independent School Dist. No. 3,* 750 F.2d 820 (1984).

JURISDICTION

1. The Opinion of the Tenth Circuit Court of Appeals was entered on December 19, 1984.

2. The Tenth Circuit Court of Appeals denied Broken Arrow Public Schools' Petition for Rehearing on January 15, 1985. The Tenth Circuit Court of Appeals stayed the mandate until March 4, 1985, pending Certiorari.

3. The statutory provision believed to confer on this Court jurisdiction to review the judgment of the Tenth Circuit Court of Appeals by Writ of Certiorari is 28 U.S.C. §1254(1).

STATUTES INVOLVED

The following statutes are involved in this case:

20 U.S.C. §1412(2)(B)

70 Okla.Stat. §13-102

70 Okla.Stat. §1-114(A)

The text of these statutes is set forth in the Opinions contained in the Appendix.

STATEMENT OF THE CASE

This case arose in connection with the education of Carla Helms, a mentally retarded student at Broken Arrow Public Schools, Tulsa County, Oklahoma. Due to the nature and severity of her handicap, Downes Syndrome, Carla was not "mainstreamed" in a class with the non-handicapped. Rather, she was in a class designed to meet the special needs of the trainable mentally handicapped. Due to the severity

of her handicap, Carla was not capable of taking and completing the majority of courses in junior high school and senior high school taken by non-handicapped students. However, a "Secondary Program" tailored to her personal educational needs was incorporated into her IEP. The Broken Arrow High School transcript showed that a modified curriculum to meet Carla's needs through grades 9, 10, 11 and 12, was implemented. The parties stipulated that at the conclusion of the 1981-82 school year Carla had received a total of twelve (12) years of special education plus one year of preschool. Although Carla's official school transcript showed she was in grade 12, her counselor and her teacher testified that due to the severity of her handicap Carla was functioning at the 1st grade level. Carla's parents participated in formulating, but never objected to the content of any of the Individualized Educational Programs (IEP's) prepared for Carla while attending Broken Arrow Public Schools. The Director of Special Education of Broken Arrow Public Schools testified he had reviewed Carla's records, and that in his opinion Carla had been receiving an "appropriate" special education while attending Broken Arrow Public Schools.

The Assistant Superintendent of Schools testified that based upon his review of Carla's IEP and other records, she was eligible for graduation. Carla's mother was advised that her daughter would be graduating at the conclusion of the 1981-82 school year. Initially, Mrs. Helms was very excited about her daughter's upcoming graduation and even ordered a cap, gown and announcements. However, Carla's mother changed her mind and attempted to block Carla's graduation after a teacher in Tulsa informed her that under

the law Carla could go to school until she was twenty-one (21). Thus, in March 1982, Carla's parents requested a due process hearing because they wanted an IEP which reflected that Carla could attend school through age twenty-one (21). Pursuant to the parents' request, a Due Process Hearing was held in April 1982 at Broken Arrow, Oklahoma. The Hearing Officer made a determination that Broken Arrow Public Schools had complied with all procedural safeguards required under the Act. Interpreting the provisions of the Act along with State law, the Hearing Officer held:

> "1. *Decision:* The School is not required, as a general policy, to provide public education to handicapped students from 18-21 years of age, provided that they have received a minimum number of 12 years of public education."

However, as a result of the School mistakenly indicating that Carla was in the 10th grade, rather than in the 12th grade, on certain documents entered into evidence at the Hearing, the Hearing Officer went on to hold that Broken Arrow Public Schools was to provide Carla with an additional two years of special education.

Broken Arrow Public Schools appealed the Decision of the Due Process Hearing Officer to the Oklahoma State Department of Education Appeal Team Review Board. The Appeal Team Review Board found that the "Broken Arrow High School transcript indicates a modified curriculum to meet the needs of this child through grades 9, 10, 11 and 12, was implemented." Also, the Appeal Team Review Board noted that the School District conceded certain errors in records which showed Carla was in the 10th grade, rather than the 12th grade. The Appeal Team Review

Board appointed by the Oklahoma State Department of Education *overturned* the Hearing Officer's Decision and held that Broken Arrow Public Schools had completed its legal obligation to provide Carla with the required number of years of education. Further, the Appeal Team Review Board ordered the Broken Arrow School District to graduate Carla and issue her a standard diploma.

Thereafter, Carla's parents instituted an action in the United States District Court for the Northern District of Oklahoma pursuant to 20 U.S.C. §1415(E). Each of the parties filed motions for summary judgment.

The Education of the Handicapped Act provides that handicapped children are eligible to receive a "free appropriate public education" until reaching the age of twenty-one (21), unless such age requirement is inconsistent with state law or practice. 20 U.S.C. §1412(2)(B). Broken Arrow Public Schools contended that Oklahoma fell within the exception to §1412(2)(B) by virtue of the official Opinions of the Attorney General of the State of Oklahoma.

In support of its position, Broken Arrow Public Schools relied upon *Attorney General Opinion No. 75-300* (Jan. 1976) which states in pertinent part:

> ". . . [T]hus, it can be seen that in instances where a trainable mentally retarded child has completed twelve (12) years of special education, §1-114 has no applicability, and the School Board need not continue providing classes until such child reaches the age of twenty-one (21)."

Also, the School District cited *Attorney General Opinion No. 80-89* (Aug. 1980) which held:

"Your first question inquires as to the legal status of persons over the age of 18 years, under the age of 21 years, and who have not completed 12 years of public education. This question can be answered without reference to the existence or degree of handicap. . . ."

* * *

". . . [I]t is the official opinion of the Attorney General that:

1. A person between the ages of eighteen (18) and twenty-one (21) years who has not completed grade twelve (12) . . . is a school age child eligible for a free public education."

The District Court ruled that the student was entitled to additional public education because Oklahoma State law was not inconsistent with the Federal scheme providing education to age twenty-one (21) set forth in §1412(2)(B). The District Court concluded in essence that unless the evidence showed that the student would receive "no benefit from additional schooling," then the student was entitled to additional special education. The District Court did *not* apply the two-part test to determine whether the student had received an "appropriate" special education, as required by *Hendrick Hudson Dist. Bd. of Ed.* v. *Rowley*, 458 U.S. 176, 102 S.Ct. 3034, 73 L.Ed.2d 690 (1982). The District Court overruled the School District's Motion for Summary Judgment, and sustained the Motion for Summary Judgment of the student.

Thereafter, the School District appealed the Decision of the District Court to the Tenth Circuit Court of Appeals, which affirmed. The Court of Appeals found Oklahoma's Statutes and Attorney General Opinions to be "irrelevant."

Also, the Court determined that the law in Oklahoma "permits" local school officials to discriminate against handicapped children with respect to the provision of more than twelve (12) years of free public education. The Court of Appeals concluded that the laws of Oklahoma did not create the kind of inconsistency contemplated by the exception in §1412(2)(B), and ruled that the School District's attempt to justify its actions based upon any other kind of inconsistency between State and Federal law was foreclosed by the "Supremacy Clause of the United States Constitution." Additionally, the Court incorrectly concluded that even if Oklahoma's law applied, that the student had not completed the 12th grade.

Broken Arrow Public Schools petitions this Court for a Writ of Certiorari to the Tenth Circuit Court of Appeals.

REASONS FOR GRANTING THE WRIT

I. THE COURT OF APPEALS DECIDED A FEDERAL QUESTION WHICH CONFLICTS WITH THE DECISIONS OF THIS COURT.

Traditionally, the states have had the role of formulating and executing educational policy. By and large, public education in America is committed to the control of state and local authorities. *Epperson* v. *Arkansas*, 393 U.S. 97, 104, 89 S.Ct. 266, 21 L.Ed.2d 228 (1968). In passing the Education for All Handicapped Children Act of 1975, "Congress' intention was not that the Act displace the primacy of States in the field of education." *Hendrick Hudson Dist. Bd. of Ed.* v. *Rowley*, 458 U.S. 176, 102 S.Ct. 3034, 73 L.Ed.2d 690 (1982).

The Education for All Handicapped Children Act provides that handicapped children are eligible to receive a "free appropriate public education" until reaching age twenty-one (21), *unless* such age requirement is inconsistent with state law or practice. 20 U.S.C. §1412(2)(B) provides in pertinent part:

> "(B) A free appropriate public education will be available . . . for all handicapped children between the ages of three and twenty-one within the state not later than September 1, 1980, *except* that, with respect to handicapped children aged three to five and aged eighteen to twenty-one, inclusive, the requirements of this clause shall not be applied in any state if the application of such requirements would be *inconsistent* with *state law* or *practice*, or the order of any court, respecting public education within such age groups in the state. . . ." (Emphasis added)

Oklahoma falls within the exception to §1412(2)(B), because in Oklahoma both handicapped and non-handicapped students between the ages of eighteen (18) and twenty-one (21) who have completed grade 12 are *not* eligible for additional free public education. Oklahoma's law and practice results from an interpretation of two Oklahoma statutes. 70 O.S. §1-114(A) states:

> "Effective with the school year beginning 1980-81, all children between the ages of five (5) years on or before September 1, and twenty-one (21) years on or before September 1, shall be entitled to attend school free of charge in the district in which they reside."

The second relevant Oklahoma statute, 70 O.S. §13-102 provides:

> "The determination whether a child is eligible for special education shall be made by the board of education

> of the school district in which such child resides, under rules and regulations approved by the State Board of Education; provided, however, that the eligibility of exceptional children shall be reevaluated at least once every (3) years. *Any child determined to be eligible shall be permitted to receive such special education for a minimum period of twelve (12) years. . . .*" (Emphasis added)

These two statutes have been interpreted in published Opinions of the Attorney General of the State of Oklahoma. The duty of the Attorney General to write Opinions in Oklahoma is prescribed by statute, 74 O.S. §18b(e). When doubt exists concerning the construction of statutes, it is the duty of public officers and agencies to follow the Opinions of the Attorney General. *Aetna Casualty & Surety Company* v. *State Board for Property and Casualty Rates,* 637 P.2d 1251 (Okl. 1981). The Opinions of the Attorney General are binding on public officials and public agencies unless and until they are overturned by a court of competent jurisdiction or until the Oklahoma Supreme Court should hold otherwise. *Grand River Dam Authority* v. *State,* 645 P.2d 1011, 1018 (Okl. 1982). It is evident, therefore, that Opinions of the Attorney General of the State of Oklahoma constitute "state law or practice" as those terms are used in the exception set forth in 20 U.S.C. §1412(2)(B).

In *Attorney General Opinion No. 80-90* (Aug. 1980), the Attorney General construed the provisions of 70 O.S. §1-114(A), supra, and held:

> "Your first question inquires as to the legal status of persons over the age of 18 years, under the age of 21 years and who have *not* completed 12 years of public education. This question can be answered *without*

reference to the existence or degree *of handicap* and is not affected by current place of domicile."

* * *

". . . [I]t is the official opinion of the Attorney General that:

1. A person between the ages of eighteen (18) and twenty-one (21) years *who has not completed grade twelve (12)* and who is a resident of the State of Oklahoma as defined by law (70 O.S. 1971, Sections 1-113 and 1-114 as amended) is a school age child *eligible* for a free public education." (Emphasis added)

Additionally, the *Attorney General* of Oklahoma in *Opinion No. 75-300* (Jan. 1976) ruled:

"Title 70 O.S.Supp. 1975, Section 1-114 is a general statute setting out the school age of all children in Oklahoma. Title 70 O.S. 1971, Section 13-102 is a specific law pertaining only to exceptional children as defined under Section 13-101, and eligible for such education under the rules and regulations approved by the State Board of Education referred to in Section 13-102. That a specific statute will prevail over a general statute in Oklahoma cannot be doubted. In this regard see Sebring v. Federal Deposit Ins. Corp., 401 P.2d 479, and other cases cited at 13 Okla.Digest, page 503, et seq. Thus, it can be seen that in instances where a *trainable mentally retarded child* has completed twelve (12) years of special education, Section 1-114 has no applicability, and the school board need not continue providing classes until such child reaches the age of twenty-one (21).

"It is, therefore, the opinion of the Attorney General that . . . it is not mandatory for public schools to provide classes for trainable mentally retarded children until they reach the age of twenty-one (21), but only

> that they provide such classes for a minimum period of twelve (12) years as provided in 70 O.S. 1971, Section 13-102." (Emphasis added)

"State practice" is further expressed in the *Regulations of the Oklahoma State Board of Education:*

> "MAXIMUM AGE — Each exceptional child has a right to 12 years of schooling. This twelve year period will start at age 6 following state regulations for entrance to first grade and will *terminate* upon completion of a *secondary program.* Twelve years of schooling is *mandated,* additional schooling through age 21 is permissible." (Emphasis added) (Vol. I, 73)

Undeniably, based upon the foregoing statute, Attorney General Opinions, and State Department Regulations, Oklahoma falls within the exception to §1412(2)(B). At the Due Process Hearing there was competent testimony that a "Secondary Program" tailored to Carla's personal educational needs was incorporated into her IEP. Further, as the State Department Appeal Team correctly noted, the "Broken Arrow High School transcript indicates a modified curriculum to meet the needs of this child through grades 9, 10, 11 and 12, was implemented."

Under Oklahoma law both handicapped and non-handicapped students between the ages of 18 and 21 who have completed grade 12 are *not* eligible to continue their education at public expense. The Court of Appeals found: (1) that Oklahoma's law was "irrelevant"; (2) that Oklahoma's law "permitted" school officials to "discriminate" against the handicapped; (3) that Oklahoma law did *not* fall within the §1412(2)(B) exception; and (4) that "the Supremacy Clause of the United States Constitution" fore-

closed the School District's attempt to justify its action based upon any other kind of inconsistency between State and Federal law. The Decision of the Court of Appeals did not properly recognize the law of Oklahoma, and conflicts with this Court's ruling in *Hendrick Hudson Dist. Bd. of Ed.* v. *Rowley*, supra, that "Congress' intention was not that the Act displace the primacy of States in the field of education." The State of Oklahoma has the right to determine the number of years of public education both handicapped and non-handicapped students are entitled to receive. The plain wording of the exception in §1412(2)(B) recognizes that right. However, the decisions of the courts below do not.

II. THE COURT OF APPEALS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE SETTLED BY THIS COURT.

This Court was first called upon to decide what was meant by the Act's requirement of a "free appropriate public education," in *Hendrick Hudson Dist. Bd. of Ed.* v. *Rowley*, 458 U.S. 176, 102 S.Ct. 3034, 73 L.Ed.2d 690 (1982). In *Hendrick*, this Court extensively reviewed the legislative history behind the Act, and reached the following conclusions which are pertinent to the case at hand:

1. "Noticeably absent from the language of the statute is any substantive standard prescribing the level of education to be accorded handicapped children." 458 U.S. 189.

2. "By passing the Act, Congress sought primarily to make public education *available* to handicapped children But in seeking to provide such access to public education,

Congress did not impose upon the States any greater substantive educational standard than would be necessary to make such access *meaningful*. Indeed, Congress expressly 'recognize(d) that in many instances the process of providing special education and related services to handicapped children is *not guaranteed to produce any particular outcome*.' S Rep, at 11. Thus, the intent of the Act was more to open the door of public education to handicapped children on appropriate terms than to guarantee any particular level of education once inside." 458 U.S. 192. (Emphasis added)

3. "That the Act imposes no clear obligation upon recipient States beyond the requirement that handicapped children receive *some form of specialized education* is perhaps best demonstrated by the fact that Congress, in explaining the need for the Act, equated an 'appropriate education' to the receipt of some specialized educational services." 458 U.S. 195. (Emphasis added)

4. "By characterizing the 3.9 million handicapped children who were 'served' as children who were 'receiving an appropriate education,' the Senate and House Reports unmistakeably disclose Congress' perception of the type of education required by the Act: an 'appropriate education' is provided when *personalized educational services are provided*." 458 U.S. 197. (Emphasis added)

5. "We think, however, that the requirement that a State provide specialized educational services to handicapped children generates no additional requirement that the services so provided be sufficient to maximize each child's potential 'commensurate with the opportunity provided other children'." 458 U.S. 198.

6. "Congress' desire to provide specialized educational services, even in furtherance of 'equality', cannot be read as imposing any particular substantive educational standard upon the States. . . . Rather, Congress sought primarily to identify and evaluate handicapped children, and to provide them with access to a free public education." 458 U.S. 200.

7. "We . . . conclude that the 'basic floor of opportunity" provided by the Act consists of *access* to specialized instruction and related services which are individually designed to provide educational benefit to the handicapped child." 458 U.S. 201. (Emphasis added)

In *Hendrick* this Court specifically stated it was not attempting to establish any one test for determining the adequacy of educational benefits conferred upon all children covered by the Act, and confined the balance of its Opinion discussing the adequacy of educational benefit to the situation where the handicapped child was being "mainstreamed" in the regular classroom. 458 U.S. 202.

In discussing what constitutes sufficient educational benefit to a handicapped child who is being "mainstreamed" in the regular classroom, this Court held that the IEP and personalized instruction "should be reasonably calculated to enable the child to achieve passing marks and advance from grade to grade." 458 U.S. 204. However, this Court stressed that passing marks and advancement from grade to grade is only relevant to determining educational benefit "if the child is being educated in the regular classrooms of the public educational system." 458 U.S. 204.

What standard determines the adequacy of "educational benefit" that must be conferred upon Carla Helms,

a mentally retarded child, in order to constitute an "appropropriate public education" under the Act? Although this question was specifically left open in *Hendrick*, the findings of this Court with respect to Congressional intent, as hereto set forth, are certainly instructive.

Carla Helms was provided with "equal access" to a public education. The parties stipulated that at the conclusion of the 1981-82 school year Carla had received a total of twelve years of free public special education, plus one year of public preschool. As the State Department Appeal Team Review Board noted, the "Broken Arrow High School transcript indicates a modified curriculum to meet the needs of this child through grades 9, 10, 11 and 12, was implemented." Although Carla was not capable of completing most "secondary" work due to her handicap, a "Secondary Program" tailored to her personal educational needs was certainly incorporated into her IEP. Carla's parents participated in developing, but *never* objected to the content of any of the previous Individualized Educational Programs prepared for Carla while attending Broken Arrow Public Schools. The Director of Special Education of Broken Arrow Public Schools gave uncontroverted testimony that in his opinion Carla had been receiving an "appropriate special education" while attending Broken Arrow Public Schools. And, the Assistant Superintendent of Schools testified that based upon his review of Carla's IEP and other records, she was eligible for graduation. That Carla benefited from the special education provided is also evidenced by the fact that her parents never did invoke "due process" procedures in prior years contesting the services provided. Further, at the Due Process Hearing the parents presented no testi-

mony or evidence that the education Carla had received in earlier years was anything short of "appropriate."

The conclusions reached by the courts below that Carla was a 10th grader are simply mistaken. To the contrary, the evidence at the Due Process Hearing showed that any reference on documents that Carla was in the 10th grade was a legitimate error and mistake. The uncontroverted testimony of Carla's counselor and her teacher showed the entries on the IEP and report cards were honest mistakes. At the Hearing, Carla's teacher explained:

> "I receive a print-out each year of my class and what grade levels, birthdays, buses, the entire thing. And there are mistakes on that print-out. And that is what I had based that (IEP and report card) on."

Also, Carla's *official* transcript vividly shows that Carla Helms was in truth and in fact in the 10th grade during the 1979-80 school year, the 11th grade during the 1980-81 school year, and the 12th grade during the 1981-82 school year.

Furthermore, at the Due Process Hearing, counsel for the student offered no evidence to show the documents referencing the "10th grade" were anything but mistakes. For example, no attempt was made to introduce evidence to show that there was a *reason* for Carla being classified as a 10th grader, i.e., being held back as a result of not reaching the criteria for achievement in the IEP. Also, Mrs. Helms knew her daughter was actually in the 12th grade. She testified she was "very excited" about her daughter's upcoming graduation, and that she even ordered a cap and gown, and graduation announcements before the teacher in Tulsa informed her Carla could go to school until she was 21.

Obviously, a handicapped student like Carla cannot be expected to achieve passing marks and advance from grade to grade like non-handicapped students, or even mildly handicapped students who can be educated in the regular classroom. However, Carla was not merely passed from grade to grade without reference to achievement. As required under the Act, "criteria" for achievement are set forth in each annual IEP prepared for Carla.

The Court of Appeals agreed with Broken Arrow Public Schools that under the Act a mentally retarded child's progress from grade to grade is to be measured by reference to the annual IEP, rather than to a standardized curriculum. However, the court concluded that the School District did not in fact comply with the provisions of the Act in this regard.

The fact is, Broken Arrow Public Schools was never offered the opportunity to specifically prove that each of Carla's IEP's showed that progress was being measured by objective standards, if that is required.

At the District Court level, both parties moved for summary judgment on one single issue. That issue was whether or not Oklahoma law fell within the exception to §1412(2)(B). There was uncontroverted testimony in the administrative record that the education Carla had received at Broken Arrow was "appropriate." If the District Court felt that Broken Arrow Public Schools was obligated to present specific evidence as to the appropriateness of Carla's education during each year while at Broken Arrow, then the court should have overruled the Motions for Summary Judgment of each party, and then conducted a hearing on the merits.

In its Decision the Court of Appeals cites 34 C.F.R. Sec. 300.300(b)(2) which provides in pertinent part:

> "If a public agency provides education to non-handicapped children in any of these age groups (18-21), it must make a free appropriate public education available to *at least a proportionate number* of handicapped children of the same age." (Court's emphasis) 750 F.2d 823

Next, the Court of Appeals went on to state:

> "Our examination of the record in this case discloses that the Court below had ample reason to conclude that the State of Oklahoma and the School District were not in compliance with this Statute and Regulation (34 C.F.R. Sec. 300.300)."

The truth of the matter is there is absolutely no evidence in the record to show that the State of Oklahoma or the School District either complied, or failed to comply with Sec. 300.300(b)(2). The District Court did not cite the Regulation, and did not conclude whether the State of Oklahoma or the School District were in compliance with the Regulation. The first reference to this Regulation in the entire history of this litigation was when it appeared in the Decision of the Court of Appeals.

Again, if the requirement in 34 C.F.R. Sec. 300.300 (b)(2) is a part of the test to determine whether or not Carla Helms was entitled to additional schooling past grade 12, then the Court of Appeals should have directed the District Court to overrule both Motions for Summary Judgment, and conduct a hearing on the merits in order that each of the parties would have the opportunity to address the issue.

CONCLUSION

Neither Oklahoma law nor the Education for All Handicapped Children Act require a school, which has provided a mentally retarded child with "equal access" to an "appropriate special education" through grade 12, to continue providing special education at public expense in order to "maximize (the) child's potential." Funding for special education is limited. If, after providing a mentally retarded child an "appropriate" public education through grade 12, a school district is obligated to make additional expenditures to continue that child's education through age 21, then the funds available to meet the special needs of other younger handicapped children will ultimately be reduced. It is respectfully submitted that the issuance of the Writ is in order.

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March, 1985

APPENDIX A

[JUNE 24, 1982]

Hearing No. 242

DUE PROCESS DECISION

PETITIONER:

Student:	Carla Roxanne Helms
Birthdate:	9/30/62
Parents:	Gail and Nita Helms
Address:	Route 3, Box 693 Broken Arrow, Oklahoma 74012
Representative:	Tom Price 9726 E. 42nd, Suite 133 Tulsa, Oklahoma

RESPONDENT:

School District:	Broken Arrow Schools
Superintendent:	C. G. Oliver, Jr., Ed.D.
Address:	601 South Main Broken Arrow, Oklahoma 74012
Representative:	Ronald L. Day 200 Court Plaza Building 228 Robert S. Kerr Avenue Oklahoma City, Oklahoma 73102
Date of Hearing:	4/16/82
Date of Decision:	6/18/82
Hearing Officer:	Rosemary F. Wayte, Ph.D.

SUMMARY OF DECISION

1. The school is not required to provide education to handicapped students from 18 through 21 years as a general policy.
2. The school will provide an additional two years of education to the student in this issue.

[APPENDIX]

WITNESSES

For the Petitioner:
1. Nita Helms, mother of the student

For the Respondent:
1. Judith D. Grass, Counselor
2. Kerry L. Potter, Current teacher
3. Gary W. Gerber, Director of Special Services
4. Blaine Smith, Assistant Superintendent of Instruction

PROCEDURAL SAFEGUARDS

Prior to the Hearing, a determination was made by the Hearing Officer that the school system had complied with all aspects of the required procedural safeguards. The full disclosure requirement was met by the exchange of written evidence and lists of witnesses at least five days prior to the hearing.

DOCUMENTARY EVIDENCE

SE 1	Extract, School Laws of Oklahoma, Section 14
SE 2	Extract, School Laws of Oklahoma, Section 83
SE 3	Extract, School Laws of Oklahoma, Section 215
SE 4	Extract, Policies and Procedures Manual, pages 11-12
SE 5	Extract, Attorney General's Opinion, 72-222
SE 6	Extract, EHA-B regulations, page 42181
SE 8	Letter from school counselors; 3-29-82
SE 9	Individualized Education Program; 4-30-81
SE 12	Parent's witness list; 4-8-82
SE 14	Middle school transcript
HO 1	Letter to superintendent; 5-17-82
HO 2	Letter to Hearing Officer; 5-25-82
HO 3	Report card; 1980-81

HO 4 Letter to Superintendent; 5-26-82

HO 5 Letter to Hearing Officer; 6-1-82

HO 6 Elementary School Record

HO 7 Transcript

HO 8 Legal Memorandum, respondent

HO 9 Legal Memorandum, petitioner

NOTE: During the hearing, the school withdrew some previously numbered evidence.

ISSUE AND PURPOSE OF THE HEARING

In this issue, the parents (petitioner) contend that the school is required by the implementing regulations for P.L. 94-142 to educate the student through 21 years of age. The school (respondent) contends that only 12 years of education is mandated under Oklahoma law and statute.

FINDINGS OF FACT

1. This nineteen-year-old, trainable mentally handicapped student has received 12 years of public education in addition to one year of preschool. (T5, T10-11, T18, T28, SE 8)

2. Until six weeks prior to the hearing, the mother (T6-7) was under the impression that the student was in the tenth grade during the 1981-82 school year.

   a. An official school "print-out" indicated tenth grade placement. (T26)

   b. The student's IEP for the 1981-82 school year indicates tenth grade placement. (T16, SE9)

   c. The student's grade level on her report card for the 1980-81 school year indicates ninth grade placement. (HO3, T22)

   d. The student's grade level on her report card for the 1981-82 school year indicates tenth grade placement. (T25, T32)

[APPENDIX]

3. The school's records regarding the student's grade level are confusing. The elementary school transcript (HO6) indicates fifth grade placement in 1973-74 and promotion to sixth grade for 1974-75. The middle school transcript (SE14), however, indicates sixth grade placement in 1975-76.

4. The school did not document expected grade placement until the spring of either 1981 or 1982. According to the mother, she contacted the school in the spring of 1982 regarding the date of the student's expected graduation (T7-8, T43). In addition the counselor's testimony (T17-18, T22, T26) and the documentary evidence (SE8) indicate that the school records were reviewed in the Spring of 1982. According to the Director of Special Services (T29-31), however, the mother originally contacted him in the Spring of 1981 and the school records were reviewed and revised at that time.

1. *Decision:* The school is not required, as a general policy, to provide public education to handicapped students from 18 to 21 years of age, provided that they have received a minimum of 12 years of public education.

   Rationale:

   (a) Section 121a. 122(a) of the EHA-B regulations requires that handicapped students be educated through 21 years of age. Schools are exempted from this requirement, however, in Section 121a. 122(c) if it is inconsistent with State law or practice. The relevant Oklahoma practice is found in the Attorney General's opinion number 75-300. The Attorney General concluded, in 1976, that schools are not required to provide education through 21 years of age if they have provided a minimum of 12 years of education. The fact that the Attorney General's opinion predates the P.L. 94-142 implementing regulations, does not negate or dilute the legal status of the opinion.

(b) The Introduction of the Policies and Procedures Manual states that "every handicaped child in Oklahoma, ages from birth through 21 years, has a right to an appropriate education (p. 1). In the section titled "Ages of Children (pp. 11-12)," however, the Policies and Procedures Manual states that education for handicapped students from 18 to 21 is permitted but not mandated. The specific section prevails over the general section.

(c) The Policies and Procedures Manual states that a handicapped student's education "will terminate upon completion of a secondary program (p. 12)." Students qualifying for classification as trainable mentally handicapped cannot be expected to complete a program of secondary education which is comparable to that of their non-handicapped classmates. Even within the category of trainable mentally handicapped, not all students can be expected to progress at the same rate, reach the same level or attain the same goals. Mastery of specific program content, therefore, cannot be used as a guideline for the completion of a secondary program.

Secondary education for trainable mentally handicapped students must be defined on an individual basis and documented on the IEP. It is true, however, that the school is not held accountable if the student does not attain the goals and objectives specified on the IEP (Regulations, Section 121a. 349; Policies and Procedures Manual, p. 30) Thus, it may be necessary to consider the number of years of schooling and the student's stated grade placement in determining when the secondary program has been completed.

[APPENDIX]

2. *Decision:* The school will provide an additional two years of education to the student in this issue.

   Rationale:

   There are many sections of the EHA-B regulations and the *Policies and Procedures Manual* which provide that handicapped students will have the same educational opportunities as non-handicapped students. For example, Section 121a. 305 requires that the same variety of educational programs and services be available to both the handicapped and non-handicapped. Further, Section 121a. 300(b)(2) requires that schools providing education to non-handicapped students from 18 to 21 years of age also must make this available to handicapped students in that age range.

   On all records readily available to the parents, the student was classified as a ninth grade student in 1980-81 and a tenth grade student in 1981-82. There is no clear-cut documentation for prior years. The school, therefore, led the parents to believe that the student's actual grade placement was two years behind her expected grade placement. As noted above, stated grade placement is a primary indicator of educational level for trainable mentally handicapped students.

   If a non-handicapped student were classified as a tenth grade student, he would receive two additional years of education. This would be true even if the student's actual grade placement were two years behind his expected grade placement. Thus, the student would receive a total of 14 years of education.

SPECIAL CONCERNS

1. The school may have altered the student's middle school and high school transcripts. In addition, a letter from the school counselors (SE 14) indicates the possibility that the transcripts of other students may have been altered.

The State Department of Education should determine if the school followed required procedures, including notification of parents, when making these changes.

2. The school does not utilize the IEP form published in the *Policies and Procedures Manual*. On the form utilized (SE 9), related services are listed and the services to be provided are checked. Sufficient space is not provided for objectives and, in this instance, the objective is "cont. as is." In addition, the "director" is specified as the person responsible for implementation and there is no ending date for the service.

   The Department of Education should determine if the IEP form is adequate and, if not, work with the school to rectify their procedures.

The decision of the Hearing Officer is binding upon both parties. Either party has the right to appeal this decision by requesting an administrative review. In order to do so, the party must file a written request with the State Department of Education, Special Education Section, Oliver Hodge Building, Oklahoma City, within ten days of the receipt of this decision.

/s/ Rosemary F. Wayte, Ph.D.
Hearing Officer

RFW/pv

APPENDIX B

Case No. 242

APPEAL HEARING AND/OR REVIEW DECISION

STUDENT'S NAME: Carla Helms

PARENT'S NAME: Gail and Nita Helms

SCHOOL DISTRICT: Broken Arrow Public Schools

BIRTHDATE: September 30, 1962

REPRESENTATIVE: Tom Price, Atty.
Protection & Advocacy Agency

REPRESENTATIVE: Ronald L. Day, Atty.

DATES FOR THE:

Initial Due Process Hearing: April 16, 1982
Initial Hearing Decision: June 18, 1982
Appeal: June 30, 1982
Appeal Decision: July 20, 1982

FORMAL REVIEW: (No Formal Review Hearing Held)
(Date) (Time) (Location)

WITNESSES: N/A

Parents *School*

PARTY APPEALING THE INITIAL HEARING DECISION: Broken Arrow Public Schools

ISSUE:

Is this TMH child eligible for an education at public expense until age 21 even though 12 years of free public education has been provided?

EVIDENCE FROM FACTS & TESTIMONY:

1. The child has attended 12 years of school plus one year of pre-school.
(Transcript pg. 1, 18, 21, 28, 30)
2. The child attended one year of pre-school and two years of special education in Tulsa.
(Transcript pg. 10, 11, 12)

[APPENDIX]

3. The child has received 10 years of special education in Broken Arrow Public Schools—the first two years in an EMH placement and the last eight years in a TMH placement.
(Transcript pg. 11 & 12)

4. The parent was aware of impending graduation.
(Transcript pg. 12)

5. The child enrolled in Broken Arrow Schools beginning April 1972.
(Transcript pg. 15)

6. Broken Arrow High School transcript indicates a modified curriculum to meet the needs of this child through grades 9, 10, 11 & 12, was implemented.
(School Exhibit 14-A & Transcript pg. 20)

7. The student's current level of functioning is stated to be at the first grade level.
(Transcript pg. 24)

8. Report cards, IEP, and the computer printout indicated that the child was in the 10th grade.
(Transcript pg. 25, 26 & School Exhibit 9)

9. The district concedes errors in record keeping procedures concerning the grade placement of this child.
(Transcript pg. 22, 26, 32)

10. A January 1976 Attorney General's opinion was introduced concerning a twelve year minimum of public education and the permissive continuation of public education through age 21 for TMH children.
(Transcript pg. 35 & School Exhibit 1, 2, 3, 4, 5)

11. The Federal Register exception regarding the right of the states to exercise some discretion in determining maximum and minimum ages for public education for handicapped children was introduced.
(Federal Register, August 23, 1977, 121a. 122(c) & School Exhibit 6)

12. The child participated in a high school work study program.
(Transcript pg. 37)

13. The work study program is provided for students in Broken Arrow Schools during their last two years of schooling.
(Transcript pg. 37)

DECISION:

The Hearing Officer's decision is overturned. Broken Arrow Public School System has completed its' legal obligation to provide this child with the required minimum number of years of education (12).

The district is ordered to graduate this child, including the issuance of their standard diploma and the completion of any necessary forms required to culminate the graduation process.

COMMENT:

Recognizing that the completion of the formal education process is not the end of all learning, it is recommended that the district meet with the parents in order to explore appropriate options that may be offered to the child through the services of: Vocational Rehabilitations, Developmental Disabilities (DHS), and Goodwill Industries.

PROCEDURAL ERRORS:

None.

CONCLUDING STATEMENT:

The decision of the Appeal Team is final and binding upon both parents and school. The program should be initiated upon receipt of this document by parent and school.

Any party aggrieved by the findings and decision made in a hearing review has the right to bring a civil action.

[APPENDIX]

/s/ Glen Haring Chairman	7-20-82 Date
/s/ Dick Heatly Member	7-20-82 Date
Member	Date

APPENDIX C

[Filed Aug. 29, 1983]

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

CARLA R. HELMS, Plaintiff, vs.	)	
INDEPENDENT SCHOOL DISTRICT NO. 3 OF BROKEN ARROW, TULSA COUNTY, OKLAHOMA; OKLAHOMA STATE DEPARTMENT OF EDUCATION, Defendants.	)	No. 82-C-752-C

ORDER

Now before the Court for its consideration are the cross motions of the plaintiff, Carla R. Helms and defendants, Independent School District No. 3 of Broken Arrow, Oklahoma and the Oklahoma State Department of Education for summary judgment pursuant to Fed.R.Civ.P. 56. On October 4, 1982 the parties filed a joint stipulation of facts in which all parties have stipulated to the relevant factual matters before this Court and have agreed that there are no material facts at issue in this case. After carefully reviewing the entire record herein, the applicable law and the arguments of counsel for the parties the Court concludes that the defendants' motions for summary judgment should be denied and that plaintiff's motion for summary judgment should be granted.

The central issue in this case is whether the plaintiff should receive free appropriate public special education until the age of twenty-one.[1] This action was instituted

[1] Though the plaintiff is entitled under the relevant law to receive appropriate public education only until she is twenty-one years old, the de-

pursuant to 20 U.S.C. Section 1415(e), under the authority of the Education for All Handicapped Children Act of 1975, 20 U.S.C. Section 1401 et seq. (hereafter EHCA). At the time the action was instituted, plaintiff was classified as a trainable mentally handicapped person nineteen years of age. Plaintiff resides in the territorial boundaries of defendant Broken Arrow Public Schools. On or about March 15, 1982, the parents of the plaintiff requested of defendant Broken Arrow the convening of a due process hearing to consider the appropriateness of the educational program being offered to plaintiff, or the lack of such an offer by Broken Arrow. This request was made pursuant to 20 U.S.C. Section 1415(b)(2). This request was honored and a hearing was held on April 16, 1982.

Thereafter, on or about June 18, 1982, the Hearing Officer issued her decision wherein she held that while public schools in Oklahoma are not generally required to provide education to handicapped students ages eighteen through twenty-one if the student has already received twelve years of public education, that in plaintiff's case the Broken Arrow Public Schools were to provide an additional two years of education to plaintiff. Defendant Broken Arrow filed a timely appeal of that decision to the Appeal Team Review Board, Oklahoma State Department of Education, Special Education Section. On July 20, 1982 the Appeal Team Review Board issued its decision overturning the Hearing Officer's ruling, and held that Broken Arrow had completed its legal obligation to provide plaintiff with the required minimum number of years of education, i.e. twelve years. Plaintiff filed this action on August 5, 1982. Further,

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[1] (Continued)

fendants have stipulated that if the Court determines she is entitled to two additional years of education the Broken Arrow School District will provide such education beyond plaintiff's twenty-first birthday. At the time this action was instituted, the plaintiff was nineteen years old. She did not attend the Broken Arrow schools during the 1982-83 school year.

the Broken Arrow School District stipulated in open court that Oklahoma state law does not mandate a *maximum* of twelve years of public special education to persons in plaintiff's classification and defendants stipulated in open court that plaintiff has not completed her secondary education in any traditional sense and the record herein clearly reflects that plaintiff is not capable of performing in a "normal" secondary program.

In a case such as that presented here, 20 U.S.C. Section 1415(e)(2) provides in relevant part as follows: "[T]he court shall receive the records of the administrative proceedings, shall hear additional evidence at the request of a party, and basing its decision on the preponderance of the evidence, shall grant such relief as the Court determines is appropriate." The parties have submitted the administrative record for this Court's review and neither party has requested that additional evidence be heard by the Court.

20 U.S.C. Section 1412(2)(B) provides in pertinent part as follows:

> In order to qualify for assistance under this sub-chapter in any fiscal year, a State shall demonstrate to the Commissioner that the following conditions are met: . . . . (2) The State has developed a plan pursuant to section 1413(b) of this title in effect prior to November 29, 1975, and submitted not later than August 21, 1975, which will be amended to comply with the provisions of this paragraph. Each such amended plan shall set forth in detail the policies and procedures which the State will undertake in order to assure that— . . .
>
> (B) a free appropriate public education will be available . . . for all handicapped children between the ages of three and twenty-one within the State not later than September 1, 1980, except that, with respect to handicapped children aged three to five and aged eighteen to twenty-one, inclusive, the requirements of this clause

> shall not be applied in any State if the application of such requirements would be inconsistent with State law or practice, or the order of any court, *respecting public education within such age groups in the State* . . . . (emphasis added)

The defendants contend that the State of Oklahoma falls within the exception set forth in 20 U.S.C. Section 1412(2)(B). This Court cannot agree. Section 1412(2)(B) is clear and unambiguous and evidences Congress's intent to exempt those states that do not provide public education to *any* children in the excepted age groups. In other words, if a state by its law or practice, or by the order of some court did not provide free public education to non-handicapped students in the exempted age groups it would not be required to provide education to handicapped students in those *same* age groups. The statute is clear in this regard. It neither allows for nor promotes a state scheme which would condone discrimination against handicapped students in these age groups.

The legislative history of the EHCA is also clear in the above regard. *See* Sen.Rept. No. 94-168 p. 19 (1975), *reprinted in* (1975) U.S.CODE CONG.&AD.NEWS 1442-1443; 121 Cong.Rec. 19492 (1975) (remarks of Sen. Williams). A review of the cases which prompted the passage of the EHCA evidence the clear intent of Congress to provide handicapped students with equal access to public education. *See Pennsylvania Association for Retarded Children* v. *Commonwealth of Pennsylvania* (PARC), 334 F.Supp. 1257 (1971), 343 F.Supp. 279 (E.D.Pa. 1972); *Mills* v. *Board of Education of the District of Columbia*, 348 F.Supp. 866 (D.C. 1972). The Supreme Court of the United States in a recent opinion has clearly acknowledged that the EHCA's intent was to provide equal access to handicapped persons, but that such right of access does not signify "[A]ny notion of absolute equality of opportunity regardless of capacity." *Board of Education of the Hendrick Hudson Central School*

District Bd. of Ed., Westchester County v. *Rowley*, ... U.S. ....., 102 S.Ct. 3034, 73 L.Ed.2d 690 (1982).

The defendants have argued a position that is simply untenable with the clear language of Section 1412(2)(B) and the intent of Congress. It should be noted that neither defendant has alleged that Oklahoma does not participate in and benefit from federal financial assistance under the EHCA. "The receipt of this federal money is contingent upon the state's performing certain *affirmative duties* with respect to the education of the handicapped." *New Mexico Association for Retarded Citizens* v. *State of New Mexico*, 678 F.2d 847, 853 (10th Cir. 1982) (emphasis in original). One affirmative duty is to comply with Section 1412(2)(B). If the state provides or assures the provisions of free public education to non-handicapped children in the age groups at issue it must provide a free public education to handicapped children in these age groups.

The defendants rely on OKLA.STAT.ANN. tit 70, Section 13-102 to support their position that state law is inconsistent with the federal scheme set forth in Section 1412(2)(B). Section 13-102 reads in pertinent part as follows:

> The determination whether a child is eligible for special education shall be made by the board of education of the school district in which such child resides, under rules and regulations approved by the State Board of Education; provided, however, that the eligibility of exceptional children shall be reevaluated at least once every three (3) years. Any child determined to be eligible shall be permitted to receive such special education for a minimum period of twelve (12) years.

The defendants contend that, because plaintiff has already received twelve years of free public education, the state has fulfilled all of its obligations to her. This argument is without merit. OKLA.STAT.ANN. tit. 70, Section 1-114(A) provides in relevant part:

[APPENDIX]

> Effective with the school year beginning 1980-81, all children between the ages of five (5) years on or before September 1, and twenty-one (21) years on or before September 1, shall be entitled to attend school free of charge in the district in which they reside.

As can be seen from a quick review of these two Oklahoma statutes a non-handicapped student has a statutory right to attend public school until the age of twenty-one, but a handicapped student, such as plaintiff, has a right to only twelve years of education, evidently regardless of the student's placement or capabilities at the end of said twelve years or the extent to which a handicapped child could benefit from additional public education.

At oral argument in this case and as evidenced by the Appeal Team Review Board's decision the defendants take the position that if a handicapped student has attended public school for at least twelve years, he or she is not entitled to additional education until the age of twenty-one. Defendants contend that pursuant to a statutory grant of authority found at OKLA.STAT.ANN. tit. 70, Section 13-105 the State Board of Education has adopted a rule defining the age limitation for the provision of special education services to handicapped or exceptional children. This provision reads as follows:

> Maximum Age—Each exceptional child has a right to 12 years of schooling. This twelve year period will start at age 6 following state regulations for entrance to first grade and will terminate upon completion of a secondary program. Twelve years of schooling is mandated, additional schooling through age 21 is permissible.

See Appendix I attached to Oklahoma State Department of Education brief in support of Motion for Summary Judgment filed August 26, 1982.

The problem with this argument is that the plaintiff has not completed any secondary program discernible from the record herein. The defendants admitted this at oral argument on this case, at least to the extent that secondary education has been completed in any traditional sense. The defendants appear to argue that a handicapped child is simply moved from grade to grade without consideration of what benefit the child has received or without regard to the child's capabilities and potential to further benefit from the educational experience after the twelve years have expired.

Furthermore, the defendants have ignored virtually all of the objective documentation concerning plaintiff's grade placement in the administrative record. Such evidence was that plaintiff was classified as a tenth grade student for the 1981-82 school year. Any student with such a classification would, thus, be entitled to an additional two years of public education or at least until the child reaches the age of twenty-one. Taking defendants' argument to its logical conclusion would mean that a non-handicapped child who has been held back in school because of poor performance for one, two or three school years has a right to further education until he or she is twenty-one, but a handicapped student no matter what his or her performance is simply barred from further education after twelve years.

No evidence or testimony has been presented to this Court that the plaintiff will receive no benefit from additional schooling. At oral argument defendants apparently attempted to convince the Court that such was the case. However, the administrative record is silent on this issue, except for certain testimony there that plaintiff is not capable of performing "normal" secondary classwork. This, however, is obvious. Plaintiff, evidently, has a current level of functioning at a first grade level. As the Hearing Officer wrote in her decision,

> Students qualifying for classification as trainable mentally handicapped cannot be expected to complete a

> program of secondary education which is comparable to that of their non-handicapped classmates. Even within the category of trainable mentally handicapped, not all students can be expected to progress at the same rate, reach the same level or attain the same goals. Mastery of specific program content, therefore, cannot be used as a guideline for the completion of a secondary program.
>
> Secondary education for trainable mentally handicapped students must be defined on an individual basis and documented on the IEP. It is true, however, that the school is not held accountable if the student does not attain the goals and objectives specified on the IEP (Regulations, Section 121a-349; Policies and Procedures Manual, p.30). Thus, it may be necessary to consider the number of years of schooling and the student's stated grade placement in determining when the secondary program has been completed.

The Hearing Officer went on to determine the stated grade placement of the plaintiff as tenth grade in 1981-82 and noted that "[S]tated grade placement is a primary indicator of educational level for trainable mentally handicapped students."

The Policies and Procedures Manual for Special Education in Oklahoma states:

> The burden of proof as to the appropriateness of any proposed special education plan, as to why a more normalized education plan could not adequately and appropriately serve the child's educational needs, and as to the adequacy and appropriateness of any identification, test, or evaluation procedure, will be upon the local agency. Policies and Procedures Manual, section XI(A)(2).

See Brief in Support of Plaintiff's Response to Defendant Oklahoma State Department of Education's Motion for Summary Judgment at p.5 filed on September 8, 1982.

Again, no evidence or testimony has been presented to this Court of the educational appropriateness of denying plaintiff a continuing special education program until she is twenty-one or that she has, in fact, completed a secondary program. Defendants' only argument is that because at least twelve years of education has been given they can in this case, and apparently in numerous others, graduate a handicapped student solely based on the number of attendance years. Before the Appeal Team Review Board the defendant Broken Arrow Public Schools argued that the references to plaintiff as a tenth grade student in the 1981-82 school year were a mistake. They pointed to the school's official transcript which showed plaintiff in the 12th grade in 1981-82. However, even if this be true, the defendants have presented nothing to this Court which would indicate anything other than that if twelve years are afforded that is all they give to handicapped students. Again, they simply move each handicapped child from grade to grade irrespective of any benefits that the child has received or could receive by more than twelve years of education.

The plaintiff herein may not benefit from traditional secondary education, but there has never been any finding that she cannot benefit from a program tailored to the unique needs she has as an individual or a trainable mentally handicapped person. It is clear that the plaintiff has not completed any secondary program and the defendants have come forward with no competent evidence that she has. In fact, the Broken Arrow High School transcript contained in the administrative record does not even contain any grades or other evaluation for the 2nd semester of the 1981-82 school year. The defendants have not presented to this Court any criteria that the state utilizes to make the determination of completion of a secondary program, and this Court concludes that the plaintiff has not completed a secondary program. Finally, in this regard defendant Broken Arrow admitted at oral argument that there is no state law defining the basis upon which "permissive" edu-

cation through twenty-one would be allowed. The criteria is, apparently, set forth by the IEP team. However, nothing brought to this Court's attention would warrant any finding that the plaintiff has completed a secondary program of education in any sense. The evidence is simply that the plaintiff has attended public schools for at least twelve years.

The Court realizes that the progression of a handicapped child such as plaintiff cannot be equated with the progression of a non-handicapped child and that even within the classification of trainable mentally handicapped children there will be innumerable variations of progression. However, the defendants cannot simply say that if twelve years of public education has been afforded to a handicapped child all educational obligations cease. They must come forward with competent evidence that they, at least, have criteria to determine whether public education, whatever its substantive content, will be afforded to such individual after the twelve years and that equal access is given to a handicapped individual. The defendants have not done this. They cannot simply move a handicapped student from grade to grade through the twelve year period and then determine in, evidently, every case to graduate the child and fulfill their obligations.

Such a scheme and practice cannot be condoned by this Court, it is not in conformity with the EHCA, it clearly does not afford equal access to handicapped children, and the Court concludes that the plaintiff is entitled to an additional two years of free appropriate public education and that such should be provided by the Independent School District No. 3 of Broken Arrow, Tulsa County, Oklahoma.[2]

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[2] The Court would note that the plaintiff did not raise in this case any issue that would necessitate review of Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. Section 794 or a constitutional claim under the equal protection clause of the Fourteenth Amendment to the United States Constitution. For this reason, the Court has not discussed their applica-

It is therefore the Order of this Court that the motions of defendants for summary judgment are denied and that the plaintiff's motion for summary judgment is granted.

It is the further Order of this Court that the Appeal Team's decision as to the following points is set aside and vacated:

1) that the Hearing Officer's decision is overturned;

2) that the Broken Arrow Public School District has completed its obligation to provide the plaintiff with a public education; and

3) that the plaintiff is to be graduated.

It is the further Order of this Court that defendant Independent School District No. 3 of Broken Arrow, Tulsa County, Oklahoma, shall provide the plaintiff an additional two years of free appropriate public education to begin with the start of the 1983-84 school year.[3]

It is so Ordered this 29th day of August, 1983.

/s/ H. Dale Cook
Chief Judge, U. S. District Court

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[2] (Continued)

bility here. *See New Mexico Association for Retarded Citizens* v. *State of New Mexico*, 678 F.2d 847 (10th Cir. 1982); *New York State Association for Regarded* [sic] *Children, Inc.* v. *Carey*, 466 F.Supp. 479 (E.D. N.Y. 1978), *affirmed* 612 F.2d 644 (2nd Cir. 1979).

[3] The Court, of course, expresses no view as to the substantive content of any educational program to be offered to the plaintiff during the 1983-84 or 1984-85 school years.

[APPENDIX]

JUDGMENT

This action came on for hearing before the Court on the parties' cross motions for summary judgment and the issues having been duly heard and considered and a decision having been duly rendered,

It is Ordered and Adjudged

that the Appeal Team Review Board's decision of July 20, 1982 is set aside and vacated as to the following points, (i) that the Hearing Officer's decision of June 18, 1982 is overturned, (ii) that the Broken Arrow Public School District has completed its obligation to provide the plaintiff, Carla R. Helms with a public education; and (III) that the plaintiff, Carla R. Helms is to be graduated.

Further, it is Ordered and Adjudged

that defendant Independent School District No. 3 of Broken Arrow, Tulsa County, Oklahoma, shall provide to the plaintiff, Carla R. Helms, two additional years of free appropriate public education to begin with the start of the 1983-84 school year and that the plaintiff recover of the defendants her costs of action.

It is so Ordered this 29th day of August, 1983.

/s/ H. Dale Cook
Chief Judge, U. S. District Court

APPENDIX D

[Filed Dec. 19, 1984]

PUBLISH

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

CARLA R. HELMS, Plaintiff-Appellee,	)	
vs.	)	
INDEPENDENT SCHOOL DISTRICT NO. 3 OF BROKEN ARROW, TULSA COUNTY, OKLAHOMA, Defendant-Appellant.	)	No. 83-2233
OKLAHOMA STATE DEPARTMENT OF EDUCATION, Defendant.	)	

Appeal from the United States District Court
For the Northern District of Oklahoma
(D.C. No. 82-752-C)

Tom Price, Tulsa, Oklahoma, for plaintiff-appellee.
Ronald L. Day of Fenton, Fenton, Smith, Reneau & Moon, P.C., Oklahoma City, Oklahoma, for defendants-appellants.

Before Logan and McWilliams, Circuit Judges, and BOHANON, Senior District Judge*

BOHANON, District Judge

This case arose under the Education for All Handicapped Children Act of 1975, 20 U.S.C. Secs. 1401, et seq. (1982). The appeal is brought by Independent School Dis-

*Honorable Luther Bohanon, North, Eastern and Western Districts of Oklahoma, sitting by designation.

trict No. 3 of Broken Arrow, Tulsa County, Oklahoma (hereinafter "school district") from a final Judgment and Order of the United States District Court for the Northern District of Oklahoma. The Oklahoma State Department of Education (hereinafter "State") was a defendant before the district court but has not appealed.

This case commenced when the parents of the appellee, Carla Helms, requested an administrative due process hearing pursuant to 20 U.S.C. Sec. 1415(b)(2) in March of 1982. At that time Carla was enrolled in the appellant school district and classified as a "Trainable Mentally Handicapped" student. Her mother had been informed, however, that the school district would not allow Carla to attend school after the end of the 1981-82 school year. The due process hearing was requested to challenge this termination of educational services.

The hearing was held before a Hearing Officer appointed by the Oklahoma State Department of Education on April 16, 1982. Carla was represented by counsel who presented testimony and documentary evidence as did the school district. The Hearing Officer's decision was issued in June of 1982. It concluded that the school district was not required to provide education to handicapped students from 18 through 21 years as a general policy, but ordered the school district to provide two additional years of education in this particular case because certain records admitted at the hearing indicated that Carla was in the tenth grade at the time of the hearing. Although the school board maintains that these records were the result of a mistake, the Hearing Officer found that they had led Carla's parents to expect two more years of education and that Carla was entitled to two more years of education even as a non-handicapped child in the tenth grade would be.

The school district appealed the Hearing Officer's decision to the Oklahoma State Department of Education which appointed an Appeal Team Review Board. After

receiving the record and briefs from both parties, but without any formal hearing, the Appeal Team, on July 20, 1982, reversed the Hearing Officer's decision and ordered Carla to be graduated without further education. The Appeal Team gave no reason for its action other than a conclusory assertion that "Broken Arrow Public School System has completed its legal obligation to provide this child with the required minimum number of years of education (12)."

Carla then brought suit in the United States District Court for the Northern District of Oklahoma seeking judicial review of the Appeal Team decision as authorized by 20 U.S.C. Sec. 1415(e) (1982). All parties moved for summary judgment before the district court, and on August 29, 1983, the court granted Carla's motion, setting aside and vacating the Appeal Team's decision and ordering the school district to provide Carla with two additional years of free appropriate public education.

Central to this case is the following portion of the EAHCA found at 20 U.S.C. Sec. 1412 (1982):

> In order to qualify for assistance under this subchapter in any fiscal year, a State shall demonstrate to the Commissioner that the following conditions are met:
>
> . . .
>
> (2) The State has developed a plan pursuant to section 1413(b) of this title in effect prior to November 29, 1975, and submitted not later than August 21, 1975, which will be amended so as to comply with the provisions of this paragraph. Each such amended plan shall set forth in detail the policies and procedures which the State will undertake or has undertaken in order to assure that—
>
> . . .
>
> (B) a free appropriate public education will be available for all handicapped children between the ages of three and eighteen within the State not later than September 1, 1978, and for all handicapped children

> between the ages of three and twenty-one within the State not later than September 1, 1980, except that, with respect to handicapped children aged three to five and aged eighteen to twenty-one, inclusive, the requirements of this clause shall not be applied in any State if the application of such requirements would be inconsistent with State law or practice, or the order of any court, respecting public education within such age groups in the State;

The school district claims that the State of Oklahoma falls within the exception provided by subsection (B) by reason of inconsistent state law and practice. Its position on this matter, however, is not entirely consistent. On page 3 of the appellate brief in chief, the school district states: "In Oklahoma both handicapped and non-handicapped students who have received twelve (12) or more years of appropriate public education are not eligible to continue to receive free public education until reaching age twenty-one (21)." This statement is simply false. As the school district's counsel admitted in oral argument, any non-handicapped student who fails a grade in Oklahoma is entitled by law to take that grade over and then, provided he or she passes the second time, proceed through the normal sequences of grades to graduation, receiving as a consequence more than 12 years of public education. Such a child is clearly entitled to a 13th, 14th or further years of schooling depending on how many grades he or she fails.

The school district, however, does not stick with this particular wording to state its position and by page 14 of its brief gives a modified statement of its argument:

> A. Under Oklahoma Law Both Handicapped And Non-handicapped Students Between the Ages Of Eighteen (18) And Twenty-one (21) *Who Have Completed Grade 12* Are Not Eligible To Continue Their Education At Public Expense.

(emphasis added). This statement is true, at least with respect to non-handicapped children. The shift from talking about the number of years to talking about numerical grade level makes all the difference. The difference, however, is not sufficient to make the exception created by Sec. 1412(2)(B) applicable. That exception by its terms refers to the "age groups" of children age three to five and eighteen to twenty-one inclusive, not to numerical grade levels. As may be inferred from what we have already indicated, though the usual age for a non-handicapped child entering his senior year in an Oklahoma high school may be seventeen, children aged eighteen, nineteen or older may nonetheless be entitled under state law to another year of free public education if they have failed one or more grades. Since non-handicapped children in these age groups may be entitled to free public education, the school district may not be heard to say that Oklahoma "State law or practice . . . respecting public education within such age groups in the State" is inconsistent with Sec. 1412(2)(B)'s requirement that a "free appropriate public education" be made available to handicapped children within such age groups. Otherwise, we would have to infer an intent on the part of Congress to allow states to discriminate against handicapped children with regard to their *access* to an adequate publicly supported education—an inference plainly contradicted by the legislative history of the EAHCA. *See Hendrick Hudson Dist. Bd. of Ed.* v. *Rowley*, 458 U.S. 176, 191-94 (1982).

This interpretation of Sec. 1412(2)(B) is consistent with the corresponding regulation issued by the United States Department of Education and found at 34 C.F.R. Sec. 300.300 (1982), which provides, in pertinent part:

> (a) *General.* Each State shall insure that free appropriate public education is available to all handicapped children aged three through eighteen within the State not later than September 1, 1978, and to all handicapped children aged three through twenty-one within the State not later than September 1, 1980.

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(b) *Age ranges 3-5 and 18-21.* This paragraph provides rules for applying the requirement in paragraph (a) of this section to handicapped children aged three, four, five, eighteen, nineteen, twenty, and twenty-one:

. . .

(2) If a public agency provides education to non-handicapped children in any of these age groups, it must make a free appropriate public education available to *at least a proportionate number* of handicapped children of the same age.

. . .

(5) A State is not required to make a free appropriate public education available to a handicapped child in one of these age groups if:

(i) State law expressly prohibits, or does not authorize, the expenditure of public funds to provide education to non-handicapped children in that age group . . ."

(emphasis added). Our examination of the record in this case discloses that the court below had ample reason to conclude that the State of Oklahoma and the school district were not in compliance with this statute and regulation. Indeed, as we will shortly discuss in more detail, the only evidence in the record regarding provision of educational services to handicapped children within the specified age groups indicated that the policy of the school district was to *never* give handicapped children more than 12 years of education regardless of their age. From this and the fact that non-handicapped children regularly receive more than 12 years' public school, it would be appropriate to infer that there were not a proportionate number of handicapped children in these age groups receiving free public schooling.[1]

The school district has cited several Oklahoma statutes, attorney general's opinions and the Regulations of the Okla-

homa State Board of Education in its effort to prove that state law and practice is inconsistent with providing free public education to members of the 18 to 21 inclusive age group.[2] We have carefully studied all of these laws and find them irrelevant for the reasons stated above. All these laws establish is that the State of Oklahoma *permits*, but does not require, local school officials to discriminate against handicapped children with respect to the provision of more than 12 years of free public education.[3] Without arguing the semantics of whether a state law that *permits* local authorities to not provide a certain service is truly *inconsistent* with a federal law that requires them to provide that service, we must note that even if state law *forbade* the provision of free public education to handicapped children for more than 12 years, so long as non-handicapped children within the 3 to 5 and 18 to 21 inclusive age groups may be entitled to free public education, there is not the kind of inconsistency contemplated by the exception in Sec. 1412(2)(B). The school district's attempt to justify its actions and policy based upon any other kind of inconsistency between state and federal law is simply in vain, given the Supremacy Clause of the United States Constitution.

As mentioned, the school board attempts to argue that Oklahoma's policy is the same with regard to both handicapped and non-handicapped children in the 18 to 21 inclusive age group in that children in either classification are not entitled to further free public education once they have completed the 12th grade. This argument is a mere sham, given the abundant evidence in the record about the difference in the methods used to determine when handicapped and non-handicapped children are in the 12th grade.

For non-handicapped children there is, of course, a standardized course content with a specific performance level that must be achieved by a student before he can be given a passing grade and so be entitled to proceed to the next-highest grade level. The school district argues that such a standardized education is not feasible, nor required

by the EAHCA, for handicapped children. Instead, the EAHCA provides that each handicapped child have an "individualized education program" or IEP tailored to his or her own specific needs and abilities. We agree with the school district that under the EAHCA a handicapped child's progress from grade to grade is to be measured by reference to his or her IEP rather than to a standardized curriculum, *see* 20 U.S.C. Sec. 1401(18)(D) (1982), but we strongly deny that any responsible judge faced with the present record could conclude that the school district does in fact comply with the provisions of the Act in this regard.

Section 602 of the EAHCA, codified at 20 U.S.C. Sec. 1401 (1982), gives the following definition of the IEP:

> (19) The term "individualized education program" means a written statement for each handicapped child developed in any meeting by a representative of the local educational agency or an intermediate educational unit who shall be qualified to provide, or supervise the provision of, specially designed instruction to meet the unique needs of handicapped children, the teacher, the parents or guardian of such child, and, whenever appropriate, such child, which statement shall include (A) a statement of the present levels of educational performance of such child, (B) a statement of annual *goals*, including short-term instructional *objectives*, (C) a statement of the specific educational services to be provided to such child, and the extent to which such child will be able to participate in regular educational programs, (D) the projected date for initiation and anticipated duration of such services, and (E) *appropriate objective criteria and evaluation procedures and schedules for determining, on at least an annual basis, whether instructional objectives are being achieved.*

(emphasis added). This subsection clearly contemplates that a handicapped child's progress in school should be measured by objective, if not standardized, standards. It would make a farce of the clear intent of Congress to in-

terpret this statute as allowing that a handicapped child could fail to meet his or her IEP objectives and yet advance a grade level. Further, it would obviously violate the objectivity requirement of subsection (E) to utilize evaluation procedures that made it impossible for a handicapped child to fail. Again we refer to the CFR section quoted earlier. The requirement of Section 300.300(b)(2) that free public education be given to at least as many handicapped children in the relevant age groups as would be proportionate to the number of non-handicapped children in the same age groups who are receiving free public education, is obviously intended to discourage states and local officials from cheating the handicapped by making it easier for them to complete their courses of instruction than it is for the non-handicapped to complete theirs.

The present case is in fact a classic example of the extreme form this kind of abuse can take. Admitted into evidence before the Hearing Officer was Carla's IEP for the then-current year. The IEP appears to conform to the requirements of the EAHCA: the child's strengths and weaknesses and current achievement levels are listed, some seven "instructional objectives" are set forth together with descriptions of the equipment, materials, and techniques to be used, the person or persons responsible for the objective, the time per day or week allotted to that objective, the projected beginning and ending dates of the course of instruction, and nine columns with the numbers 10 through 90 in increments of 10 for indication of the date on which that percentage of the objective is mastered. On the IEP included in the record, these last columns are completely blank. This would seem to indicate that as of the date of the hearing, three quarters of the way through the school year, no attention whatsoever had been paid to the extent to which Carla was accomplishing her objectives. Indeed, since the school district failed to submit any of Carla's IEP's from previous years (even though it had ample opportunity to do so before the Hearing Officer, the Appeal Team and

the District Court) there is little evidence in the record to indicate that Carla's success or failure as measured by her ability to master specific objectives was *ever* considered. In fact the most favorable evidence in this regard for the school district is found on the first page of the only IEP in the record. There, in the upper left-hand corner, the form clearly indicates that during the school year in which the due process hearing was held Carla Helms was in the *tenth*, not the *twelfth* grade, meaning that her progress had been evaluated in previous years, was found unsatisfactory, and she was failed. This grade level was also substantiated by her report cards and a computer printout. The school district claims that this evidence, which makes it seem to have been doing the job mandated by Congress as a condition for the receipt of federal funds, was a mistake.

In fact, the school district claims in its appellate brief that "[t]he Appeal Team Review Board determined that the 'report cards, IEP, and the computer printout indicate[ing] that the child was in the 10th grade,' were 'errors in record keeping.'" This statement is a misrepresentation of what may actually be found in the record before us. The record discloses that on page 2 of its "Appeal Hearing and/or Review Decision" the Appeal Team summarized, without comment, "Evidence From Facts & Testimony" including the following items:

> 8. Report cards, IEP, and the computer printout indicated that the child was in the 10th grade.
> (Transcript pg. 25, 26 & School Exhibit 9)
>
> 9. The district concedes errors in record keeping procedures concerning the grade placement of this child.
> (Transcript pg. 22, 26, 32)

This mere report that the school district *conceded* errors in record keeping is far from a reasoned determination by the Appeal Team that the indications of the 10th grade standing were *in fact* mere errors in record keeping. The

truth is that the only thing in the record supporting the school district's assertion that these indications were erroneous is the school district's assertion.

The real reason why the school district has taken this position is shown in the following very revealing excerpts from the testimony before the Hearing Officer of Judy Grass, the school counselor who discovered the "mistake":

Tom Price: [counsel for Carla Helms]	Let's go to the first page of that exhibit. [Carla's IEP] Up in the top left hand corner we have some information as to the child's name, the school name, grade and all of that. What is the grade listed there for this child?
Judy Grass:	10th.
Tom Price:	I take it then that she was to be considered a 10th grader for the incoming school year. Is that right?
Judy Grass:	At that point.
Tom Price:	At that point?
Judy Grass:	Yes.
Tom Price:	Has it changed since then?
Judy Grass:	Yes, sir.
Tom Price:	Why is it changed? Do you have any idea as to why it would change, you know, does the child—
Judy Grass:	Suddenly jump a year?—We were asked to review the records. At that time I did not have all of the records on where she had been. And we were asked later to go in depth and figure out exactly *how many years* she had been in school.

. . .

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Judy Grass: . . . In a normal program I would assume that the secondary level program would be the 12th grade. This is not what I would consider a normal secondary level program. If somebody came up to me and talked about the secondary student, I would not assume that it would be a TMH student. So, in this case, the secondary program from that I understand *is to be through the 12 years of school.* . . .

Ronald Day: [counsel for the school district] Do you have an explanation as to why the 9th grade is on that [report card for the previous year]?

Judy Grass: No.

Ronald Day: In your opinion, is it a mistake?

Judy Grass: Yes. Again, as I stated, we were just asked to research this year and my files were not complete until just recently. Some of these documents were still at special services. They had not given them to me. And, when they said would you please research, then, I found out *she had been in school for 12 years.*

(Due Process Hearing Transcript at 16, 17, 22) (emphasis added). This makes it obvious that the school district's attempt to qualify under the exception in Sec. 1412(2)(B) by rephrasing its claim to talk in terms of grade level rather than the clearly discriminatory number of years standard is just so much doubletalk. For the school district twelfth grade is the twelfth year and vice versa where a handicapped child is concerned, and objective criteria of evaluation be damned. We agree whole heartedly with the district court's finding that:

> The defendants appear to argue that a handicapped child is simply moved from grade to grade without consideration of what benefit the child has received or without regard to the child's capabilities and potential to further benefit from the educational experience after the twelve years have expired.

The school district has ardently protested that the reference by the court below to the benefit Carla might receive from additional schooling indicates that that court used an erroneous standard in determining the school's obligation to provide Carla with additional education, citing *Hendrick Hudson Dist. Bd. of Ed.* v. *Rowley*, 458 U.S. 176 (1982). This argument is at best a diversionary tactic in the school district's meritless case and we need not examine in detail its curious assertion that an educational program that, in effect, required no more than the passage of time for its successful completion was somehow "appropriate" for Carla under the EAHCA. We would, however, observe that it was counsel for the school district who first suggested in the hearing before the court below that Carla's alleged inability to derive benefit from further education provided some sort of justification for the school's decision to terminate her schooling at the end of twelve years. (*See* ROA Vol III at 30). We see nothing in the district court's discussion of this matter that does not amount to a very appropriate and thorough rejection of this suggestion.

We have considered the rest of the school district's arguments and find them to be without merit. The decision of the district court is affirmed in all respects.

Affirmed.

FOOTNOTES

[1] Under the provisions of Sec. 1415(e)(2), the school district was entitled, upon request, to have the court below hear evidence in addition to that already placed of record before the State Hearing Officer. The school district failed to make such a request, however, and did not offer any additional witnesses or exhibits.

[2] 70 O.S. Sec. 1-114(A) (1981) ("Effective with the school year beginning 1980-81, all children between the ages of five (5) years on or before September 1, and twenty-one (21) years on or before September 1, shall be entitled to attend school free of charge in the district in which they reside."); 70 O.S. Sec. 13-102 (1981); Oklahoma Attorney General Opinion No. 75-300 (Jan. 1976); Oklahoma Attorney General Opinion No. 80-89 (Aug. 1980); *Policies and Procedures Manual for Special Education in Oklahoma, 1982,* 2 (1982).

[3] ". . . in instances where a trainable mentally retarded child has completed twelve (12) years of special education . . . the school board *need* not continue providing classes until such child reaches the age of twenty-one (21)." Oklahoma Attorney General Opinion No. 75-300 (Jan. 1976) (emphasis added). "Twelve years of schooling is mandated, additional schooling through age 21 is permissible." *Policies and Procedures Manual for Special Education in Oklahoma, 1982,* 2 (1982).

APPENDIX E

NOVEMBER TERM—JANUARY 15, 1985

Before Honorable James K. Logan, Honorable Robert H. McWilliams, Circuit Judges, and Honorable Luther L. Bohanon, District Court Judge.

CARLA R. HELMS, Plaintiff-Appellee,	)	
vs.	)	
INDEPENDENT SCHOOL DISTRICT #3 OF BROKEN ARROW, TULSA COUNTY, OKLAHOMA, Defendant-Appellant,	)	No. 83-2233
OKLAHOMA STATE DEPARTMENT OF EDUCATION, Defendant.	)	

This matter comes on for consideration of appellant's petition for rehearing filed in the captioned cause.

Upon consideration whereof, the petition for rehearing is denied.

/s/ Howard K. Phillips
Clerk